In The

Supreme Court of the United States

October Term, 1973

BOARD OF JUNIOR COLLEGE DISTRICT NO. 515, COUNTIES OF COOK AND WILL AND STATE OF ILLINOIS, a body politic and corporate, and JAMES GRIFFITH, ANTHONY HANNAGAN, DORIS HILL, WILLIAM JACKSON, LESTER KLOSS, SHIRLEY MELECKER AND THOMAS PORTER, individually and as members of the Board of Trustees,

Petitioners,

vs.

RICHARD W. HOSTROP,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent prays that the requested writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on December 21, 1972.

STATEMENT OF THE CASE.

In July, 1967, Dr. Richard Hostrop was hired by the Board of Junior College District No. 515 as Chief Administrative Officer and President of Prairie State College, and was given a written contract for one year. His employment was regularly extended by written contract. In fact, shortly before the present dispute arose, a two-year contract was abrogated and replaced by a new two-year contract at a higher salary, extending through June, 1972. Obviously, at that time defendants were quite pleased with respondent's performance of his duties.

In May, 1971, plaintiff, acting in his official capacity and fully within his authority, circulated a confidential memorandum to the administrative staff of Prairie State, simply for the purpose of study and subsequent comment at an upcoming Cabinet meeting. The memorandum proposed, only as a topic for discussion, the proposition that the school discontinue its existing Ethnic Studies Department, and reassign the relevant ethnic programs to other academic departments. For example, ". . . Afro-American History would be taught within the History Department, Ethnic Art courses within the Art Department, 'Black Psychology' taught within the Psychology Department, Afro-American Communications taught within the English Department, Swahili taught within the Foreign Languages Department, etc." The memorandum also proposed that the Director of Ethnic Studies be responsible to serve as a resource person to the entire academic community.

Without the knowledge or approval of respondent, some unknown person caused the memorandum to be published in the school newspaper. At a subsequent Board Meeting,

it was publicly stated to the Board that it had no plan to change the Ethnic Studies program for the upcoming school year. At this time, certain members of the Board of Trustees questioned plaintiff's right to compose the memorandum. Almost immediately thereafter, plaintiff was called into the office of a newly appointed and uninformed special counsel to the board and advised that he had the choice of resigning or being fired, that his contract was terminated, that no hearing would be permitted, and that no specific charges would be given, although allegedly one of the reasons for his termination was the circulation of the memorandum. Plaintiff refused to resign, demanded proper notice of formal charges and a hearing in accordance with the Board's long established Policies and Procedures. On July 23, 1970, without notice or charges of any kind to plaintiff, his employment was terminated at a special board meeting. It was only after this action had taken place that plaintiff's attorney was given a statement of the alleged reasons for plaintiff's termination, none of them well founded. The Board continued to refuse to grant plaintiff a hearing on any of the alleged reasons for his termination. It still persists in this attitude.

Plaintiff's suit, brought under 42 U.S.C. §1983, was dismissed by the District Court, on motion and without a trial, for alleged failure to state a claim upon which relief can be granted. The basis for this conclusion was that "the nature of the position of a college president is such that the board must have the 'confidence' in and the 'personal loyalty' of the president," and thus, the plaintiff had "no first amendment rights that were violated." The district court also held that respondent had no due process rights which would entitle him to a hearing.

The Court of Appeals for the Seventh Circuit reversed and remanded, holding that plaintiff had indeed stated a

cause of action. In a well-reasoned and comprehensive opinion, the Court recognized the commitment of our society to academic freedom, and rejected defendants' attempt "to excise a class of academic personnel who will have no first amendment rights." The Court held that under *Pickering* v. *Board of Education,* 391 U.S. 563 (1968), "an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements." The Court also held that plaintiff was "entitled to be protected from retaliation for actions which he had every reason to believe were a part of his assigned duties."

The Court rejected defendants' contention that they had an unfettered discretion to hire and fire presidents at will, despite any outstanding contract, as here. Concluding that the charges given to plaintiff after the firm decision to terminate his employment had been made were such as to damage his standing in the community and professionally by charging with him dishonesty, the Court held that "due process must provide notice and an opportunity to refute such charges." The Court also found a deprivation of plaintiff's property in the form of "a legitimate claim of entitlement to the position of President of Prairie State Junior College" . . . under the terms of a series of employment contracts." The Court found that the existence of this property right "obligates the Board to grant plaintiff a hearing where he can be fully informed of the reasons for his nonretention and challenge their sufficiency." The form of hearing to which he was entitled was defined so as to require "that plaintiff be given a notice of the charges against him, notice of the evidence upon which the charges will be based, a hearing before a tribunal possessing apparent impartiality, and a chance to present witnesses and confront adverse evidence at the hearing."

REASONS FOR REFUSING THE WRIT.

Apparently, defendants have abandoned their claims that plaintiff has no First Amendment rights, and now ask this Court to grant their request for a Writ of Certiorari based solely upon the form of hearing which the Court of Appeals mandated in its opinion in this matter. Defendants object to the requirement that they be required to hold "a full trial-type hearing before an 'apparent impartial tribunal.'" (Petition, page 8) The basis for this objection is that to require such a hearing in the case of chief administrators "would create havoc and uncertainty in the nation's schools." (Petition, p. 9) Plaintiff respectfully submits that the issue sought to be raised by defendants here is insubstantial, and does not present a ground upon which this Court should grant its writ. Furthermore, the record in this case does not present a proper vehicle for the exploration of such an issue, should that issue be deemed substantial.

Defendants' argument amounts to nothing more than an assertion that school boards across the country should be given carte blanche to discharge their chief administrative officials in disregard of rudimentary elements of due process. In the recent cases of *Board of Regents* v. *Roth*, 408 U.S. 564 (1972) and *Perry* v. *Sinderman*, 408 U.S. 593 (1972), this Court fully explored the rights of academic personnel in regard to freedom of speech and due process. The only distinguishing factor between this case and those is that here the plaintiff is the chief administrative official rather than a teacher. That distinction is one only of degree, not of kind, and presents no new considerations which should impel this Court to

re-examine again those guidelines which it so clearly set forth in the *Roth* and *Sinderman* cases. What was said there is dispositive of this matter, as correctly determined by the Court of Appeals.

Defendants proceed on the erroneous grounds that the nature of the protection afforded to individuals rests entirely upon their status. This Court has rejected that contention. It is the form of interest possessed by the plaintiff which has been infringed by defendant which is determinative. As was said in *Perry* v. *Sinderman, supra,*

> "We have made clear in *Roth, supra, at* ....., 92 S. ....Ct. at ....., that 'property' interests subject to procedural due process protection are limited by few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' Id. at ....., 92 S. Ct. at .....
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> "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Ibid.*"

As was found in *Perry,* plaintiff clearly has a property interest here which entitles him to due process protection. He was working on a written contract, which gave him specific entitlement to employment for a specific period of time. This contract had recently been extended at increased compensation. It is this interest which is being protected, not simply the position occupied. This was also emphasized in *Roth,* where the Court said:

> "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut,* 401 U.S. 371, 379, 91 S. Ct. 780, 786, 28 L. Ed. 2d 113. 'While "[m]any

> controversies have raged about . . . the Due Process Clause," . . . it is fundametal that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' *Bell* v. *Burson*, 402 U.S. 535, 542, 91 S. Ct. 1586, 1591, 29 L. Ed. 2d 90." 408 U.S. at .....,92 S. Ct. at 2705 (fn. 7)

Contrary to the assertions of defendants, a hearing prior to the decision to terminate is the rule, rather than the exception. A subsequent hearing is to be countenanced only when there is some extraordinary situation where some valid governmental interest is at stake. There has been no showing that this case presents such an extraordinary situation which would require postponing the hearing until after the damage has been done. Defendants have presented no reasons why this Court should consider departing from that well-established rule in situations involving run-of-the-mill disputes between school boards and administrative personnel.

In *Perry* it was held that proof of a property interest such as contractual entitlement to a job position "would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at ....., 92 S. Ct. at 2708.

The only thing which has been added to this requirement by the Court of Appeals is the stipulation that the hearing be held "before a tribunal possessing apparent impartiality.'" It is difficult to conceive how defendants could object to such a fundamentally sound requirement. Surely they do not ask this Court to sanction the holding

of a hearing by a biased tribunal which has already predetermined the case. To so hold would destroy the reasons for holding the hearing in the first place. It would sanction the existence of a kangaroo court. If a hearing is to be held prior to the taking of the proposed action, there must be a reasonable chance on the part of the employee to convince the decision-makers that the proposed action ought not to be taken. Anything less would be nothing more than paying lip-service to the Constitution while ignoring its substantive protections.

The lack of good faith of defendants herein is amply demonstrated even in their Petition for Writ of Certiorari, where they state that "there is no possibility that the plaintiff could be reinstated." (Petition, p. 10) This shows that at no time had defendants ever considered granting plaintiff the constitutional rights to which he was entitled. They had made up their mind, and nothing that could be done or said would change their minds. Even proof that their reasons for discharge were totally unfounded and erroneous would not serve to grant plaintiff his contractual and constitutional rights.

While tacitly recognizing that plaintiff does in fact have First Amendment rights to freedom of speech, defendants reiterate their previous arguments that the Board "must retain the right to summarily dismiss its President when it no longer has confidence in him." (Petition, p. 10) Yet, there is absolutely no reason given for this obviously falacious attitude. Defendants would thus deny plaintiff all rights, both contractual and constitutional. This Court has consistently rejected the possibility of such arbitrary action by the government, be it State or Federal. This argument presents absolutely nothing for this Court to consider. Certainly, it is within the power of the Board to determine how often it will review the relationship with its President. It need not enter into

a two-year employment contract as it chose to do. Having made that determination, it must live with it.

In attempting to conjure the familiar "parade of horribles" which will follow the implementation of the decision of the Court of Appeals, none of which is factually founded, defendants argue that such implementation will force the Board to accept a President with whom it can no longer work in carrying out its duties. (Petition, p. 10) In support of this position, defendants posit the proposition that the president's "position vis-a-vis the board is a close and intimate working relationship requiring a high degree of personal loyalty and confidence." (Petition, p. 9) There is nothing in the record to support this proposition other than defendants' self-serving arguments. This is exactly what the Court of Appeals referred to when it noted in its opinion that the record at this state of the litigation does not clearly define the working relationship between plaintiff and defendants. It does not indicate how closely plaintiff had to follow the dictates of the Board, how much power he had to formulate educational policy, and how much ability he had to debate or discuss with Board members on matters of policy. Petitioners assume that the only acceptable relationship is one of master and servant, where the servant constantly submits to the master at all times. The record does not indicate how a hearing procedure would interfere with the discretion of the Board in hiring and firing personnel. The record does indicate, without doubt, that defendants have in fact instituted just such a hearing procedure in their Policies and Procedures which they now contend would constitute a complete disruption of their ability to operate. Fair procedures are always distasteful to persons who want to bring about an unfair result.

The lack of evidence available to support a full exploration of these issues in this context demonstrates the inadvisability of granting certiorari in this case. This record, relatively bare of such supporting data, would not provide this Court with the materials with which to make an informed decision as to the competing interests which defendants assert must be balanced. There is, in short, nothing in this record which would justify this Court's reaching any conclusion different from that reached by the Court of Appeals—the rights of plaintiff are the same as the rights of classroom teachers generally.

Since defendants have in effect conceded that this matter should not be dismissed, and that plaintiff does in fact have rights to freedom of speech and due process, there is no reason that this Court should take this case at this time. The matter will have to be remanded to the District Court for further proceedings in any event. Further, defendants themselves have declared that they, by their own actions and attitudes, have made moot the very point which they seek to present to this Court. They have declared, in their Petition, as well as elsewhere throughout the record, that they will grant plaintiff no hearing, and will never, in any circumstances, reinstate plaintiff to his position as President of Prairie State Junior College. Thus, there is in reality, nothing for this Court to consider at this time. What defendants ask this Court to do is to render an advisory opinion on the kind of hearing to which school administrators are entitled in a fact situation in which such a determination is not necessary for a resolution of the case.

Finally, defendants have pointed to absolutely no cases which support their position. No Court of Appeals or District Court has rendered an opinion which would sup-

port their position. For all that appears here, the decisions of the Circuits in this matter are uniform. Until such time as it can be demonstrated that such a conflict has arisen, the issue is not yet ripe for determination by this Court. Until some lower Court has considered arguments similar to those advanced by defendants here, and found those arguments to be persuasive in a discrete fact situation, there is no reason for this Court to consider them, particularly where the record here does not contain sufficient factual material to support them. Petitioners' argument is really summed up in their unwillingness to correct a gross injustice which they brought about. They want this Court to say that a college president under contract has no constitutional rights.

CONCLUSION.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied, or in the alternative, such Petition for a Writ of Certiorari should be granted, and the opinion of the Court of Appeals summarily affirmed on the basis of the opinion handed down by that Court.

Respectfully submitted,

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